SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000139-001 DT 03/29/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA JAMES D NEUGEBAUER

v.

ERIKA LYNN HAVEN (001) CHRISTOPHER G MCBRIDE

REMAND DESK-LCA-CCC
SCOTTSDALE CITY COURT

RECORD APPEAL RULE / REMAND

SCOTTSDALE CITY COURT

Cit. No. #1486802X

Charge: 1) EXTREME DUI-BAC .15 OR MORE

DOB: 10/09/69

DOC: 02/25/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

Facts:

On February 25, 2002, Appellant, Erika Haven, was stopped for failure to drive in a single lane. During the traffic stop, a DUI investigation ensued, wherein the officer administered

the HGN[1] test to Appellant. The officer asked Appellant if she had been drinking and she responded with a request to call her attorney. Appellant then used her cell phone and called her attorney. After the call to her attorney, Appellant informed the officer that she would not submit to any further sobriety tests. Appellant was then arrested, read the Admin Per Se affidavit and transported to a local hospital for a blood draw. Upon arrival at the hospital, Appellant requested to speak to her attorney a second time. Appellant was transported to the jail to allow her to call her attorney. After using the phone, Appellant consented to a blood draw and was taken to the hospital. After the blood draw, Appellant was taken back to the jail and read her *Miranda* rights. Appellant was charged with extreme DUI, in violation of A.R.S. §28-1382(A)(2). Appellant filed a pre-trial Motion to Dismiss based on a "right to counsel" violation. After an evidentiary hearing , the trial court denied the motion. At trial, Appellant was found guilty and filed a timely notice of appeal.

Issues & Analysis:

The issue is whether the police violated Appellant's right to counsel during the course of their DUI investigation. Appellant argues the officers prevented her from speaking with her attorney in private, and that the "record contains no evidence justifying the State's refusal to allow [Appellant] access to her counsel."[2] Appellant's argument directly concerns the sufficiency of the evidence presented at the evidentiary hearing. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[3] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[4] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.[5] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[6] When the sufficiency of evidence to support an order or judgment is questioned on appeal, an appellate court will examine the record only to

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[1] Horizontal Gaze Nystagmus.
[2] Appellant's Memorandum, p. 9.
[3] State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).
[4] Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[5] Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[6] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

determine whether substantial evidence exists to support the action of the lower court.[7] The Arizona Supreme Court has explained in *State v. Tison*[8] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[9]

After a careful review of the record, I find that Appellant spoke to her attorney twice before consenting to the blood draw: first, via telephone while roadside[10]; second, while in the private phone room in the jail.[11] Thus, the record shows that Appellant had ample time to speak privately with her attorney, thus complying with the Sixth Amendment of the U.S. Constitution, and Article 2, Section 24 of the Arizona Constitution. Though Appellant and her attorney never spoke face-to- face, there is no violation of Appellant's right to counsel. Criminal suspects are not entitled to the *presence* of an attorney during sobriety tests.[12]

> [The Arizona Supreme Court] has consistently rejected the proposition that a motorist who faces civil license suspension is entitled to assistance of counsel in deciding whether to submit to chemical breath testing. In criminal DUI proceedings, however, a qualified right to counsel has been established. While the accused does not have the right to interrupt a continuing investigation in order to consult with an attorney, if there is no disruption of the investigation, the defendant may exercise the right to counsel.[13]

Appellant did consult her attorney on two occasions. Consequently, there was no violation of Appellant's right to counsel.

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[7] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[8] Supra.
[9] *Tison*, at 553, 633 P.2d at 362.
[10] Transcript, p. 49, ll. 2-14.
[11] *Id*., p. 52, l. 21 – p. 55, l. 14.
[12] *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 203 Ariz. 326, 337, 54 P.3d 355, 366 (App. 2002); See *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989); *Kunzler v. Miller*, 154 Ariz. 570, 571, 744 P.2d 671, 672 (1987); *Campbell v. Superior Court*, 106 Ariz. 542, 549-50, 479 P.2d 685, 692-93 (1971).
[13] *Tornabene*, 203 Ariz. at 337, 54 P.3d at 366; See also *Hiveley v. Superior Court*, 154 Ariz. 572, 574, 744 P.2d 673, 675 (1987); *McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

Though not listed an issue, Appellant alleges that Appellant's right to gather exculpatory evidence was violated. As the State correctly argues, a defendant must be given only a "reasonable opportunity" or a "fair chance" to gather such evidence.[14] The record shows that upon release to her attorney, which was within one hour of the blood draw, Appellant had ample opportunity to gather exculpatory evidence (independent blood draw, videotaping of Appellant's physical abilities, recording Appellant's voice, etc.), but Appellant and her counsel chose to gather nothing. I find no violation of Appellant's right to gather exculpatory evidence.

IT IS THEREFORE ORDERED affirming the findings of guilt and sentences imposed by the Scottsdale City Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for all further, if any, and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

[14] *Van Herreweghe v. Burke ex rel. County of La Paz*, 201 Ariz. 387, 389, 36 P.3d 65, 67 (App. 2001).